8011-01P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93773; File No. SR-MEMX-2021-18]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule

December 14, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 1, 2021, MEMX LLC ("MEMX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members[3] (the "Fee Schedule") pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on December 1, 2021. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Exchange Rule 1.5(p).

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to provide free executions for Retail Orders[4] with a time-in-force ("TIF") instruction of Day,[5] GTT[6] or RHO[7] that remove liquidity from the Exchange upon entry into the System.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading

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4 A "Retail Order" means an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization ("RMO"), provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 11.21(a).

5 "Day" is an instruction the User may attach to an order stating that an order to buy or sell is designated for execution starting with the Pre-Market Session and, if not executed, expires at the end of Regular Trading Hours. Any Day Order entered into the System before the opening for business on the Exchange as determined pursuant to Exchange Rule 11.1, or after the closing of Regular Trading Hours, will be rejected. See Exchange Rule 11.6(o)(2). The term "System" refers to the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing. See Exchange Rule 1.5(gg).

6 "GTT" or "Good-'til-Time" is an instruction the User may attach to an order specifying the time of day at which the order expires, which is designated for execution starting with the Pre-Market Session. Any unexecuted portion of an order with a TIF instruction of GTT will be cancelled at the expiration of the User's specified time, which can be no later than the close of the Post-Market Session. See Exchange Rule 11.6(o)(4).

7 "RHO" or "Regular Hours Only" is instruction a User may attach to an order stating that an order to buy or sell is designated for execution only during Regular Trading Hours and, if not executed, expires at the end of Regular Trading Hours. Any order with a TIF instruction of RHO entered into the System before the opening or after the closing of Regular Trading Hours will be rejected. See Exchange Rule 11.6(o)(5).

systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.[8] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 4% of the overall market share.[9] The Exchange in particular operates a "Maker-Taker" model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

As noted above, the Exchange is proposing to provide free executions (i.e., the Exchange would charge no fee and provide no rebate) for Retail Orders with a TIF instruction of Day, GTT or RHO that remove liquidity from the Exchange upon entry into the System (such orders, "Removing Retail Orders"). As proposed, the free executions would apply to Removing Retail Orders in securities priced at, above or below $1.00 per share.[10] Currently, executions of Removing Retail Orders in securities priced at or above $1.00 per share are assessed the standard fee of $0.0029 per share to remove liquidity from the Exchange (or a lower fee of $0.0027 per

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8 Market share percentage calculated as of November 30, 2021. The Exchange receives and processes data made available through consolidated data feeds (i.e., CTS and UTDF).

9 Id.

10 This proposed pricing is referred to by the Exchange on the Fee Schedule under the new description "Removed volume from MEMX Book upon entry, Retail Order (Day/GTT/RHO)" and such orders will receive a Fee Code of "Rr0" assigned by the Exchange.

share if the entering User qualifies for the Liquidity Removal Tier 1), and executions of Removing Retail Orders in securities priced below $1.00 per share are assessed the standard fee of 0.05% of the total dollar value of the transaction to remove liquidity from the Exchange.

The Exchange notes that multiple other equities exchanges currently provide free executions for retail orders that remove liquidity upon entry in securities priced at, above or below $1.00 per share.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[12] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[13] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system "has been remarkably

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11 See, e.g., the Cboe EDGX Exchange, Inc. equities trading fee schedule (available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/), which provides for free executions for retail orders with a TIF instruction of Day or RHO that remove liquidity on arrival in securities priced at, above or below $1.00 per share; the Investors Exchange LLC equities trading fee schedule (available at https://exchange.iex.io/resources/trading/fee-schedule/), which provides for free executions of retail orders that remove liquidity.

12 15 U.S.C. 78f.

13 15 U.S.C. 78f(b)(4) and (5).

successful in promoting market competition in its broader forms that are most important to investors and listed companies."[14]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. The Exchange also notes that the competition for Retail Order flow is particularly intense, especially as it relates to exchange versus off-exchange venues.[15] Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, particularly as they relate to competing for Retail Order flow, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members.

The Exchange believes that the proposal to provide free executions for Removing Retail Orders is reasonable, equitable and not unfairly discriminatory. Specifically, the Exchange believes such proposal is reasonable as it is reasonably designed to incentivize RMOs to submit additional Removing Retail Orders to the Exchange, and such market participants would not be subject to a fee for the execution of such orders. This is consistent with, and competitive with, fees and rebates assessed for retail order flow on other equities exchanges, which provide pricing incentives to retail orders in the form of lower fees (including free executions) and/or higher rebates.[16] In addition, the Exchange notes that it also currently offers a separate pricing incentive

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14 Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

15 Securities Exchange Release No. 86375 (July 15, 2019), 84 FR 34960 (SR-CboeEDGX-2019-045).

16 See supra note 11; see also the NYSE Arca, Inc. equities trading fee schedule on its public website (available at [sic]), which provides for enhanced rebates ranging from

for Retail Order flow in the form of a higher rebate of $0.0037 per share for Retail Orders that add displayed liquidity to the Exchange in securities priced at or above $1.00 per share as compared to the standard rebate of $0.0028 for non-retail orders that add displayed liquidity to the Exchange in securities priced at or above $1.00 per share, which is similarly designed to attract Retail Order flow to the Exchange.

As noted above, the Exchange believes that providing free executions for Removing Retail Orders is reasonably designed to incentivize an increase in Removing Retail Order flow. Retail Orders are generally submitted in smaller sizes and tend to attract liquidity-providing market makers, as smaller size orders are easier to hedge, and Retail Order flow that removes liquidity additionally signals to liquidity providers to increase their overall provision of liquidity in the markets. Increased market maker activity facilitates tighter spreads and an increase in overall liquidity provider activity provides for deeper, more robust levels of liquidity, both of which signal additional corresponding increase in order flow from other market participants, contributing towards a robust, well-balanced market ecosystem. Indeed, increased overall order flow benefits all investors by continuing to deepen the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange notes that the proposed free executions for Removing Retail Orders will be automatically and uniformly applied to all RMOs' qualifying orders. The Exchange additionally notes that while the proposed free executions are applicable only to qualifying Retail Orders, which may only be submitted by RMOs, the Exchange believes this application is equitable and not unfairly discriminatory as the Exchange offers other pricing incentives in the

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$0.0032 to $0.0038 per share, depending on the applicable tier, for retail orders in securities priced at or above $1.00 per share that add liquidity as compared to the standard rebate of $0.0020 per share for non-retail orders in securities priced at or above $1.00 per share that add liquidity.

form of enhanced rebates and reduced fees to qualifying non-Retail Order flow that may be submitted by all Members.[17] The Exchange understands that Section 6(b)(5) of the Act[18] prohibits an exchange from establishing rules that are designed to permit unfair discrimination between market participants. However, Section 6(b)(5) of the Act[19] does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of Retail Order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around Retail Order executions such that retail investors would receive free executions for Removing Retail Orders on the Exchange rather than paying a fee, as they do currently, in order to encourage entry of Removing Retail Orders to the Exchange. Accordingly, the Exchange believes the proposed free executions for Removing Retail Orders is not unfairly discriminatory.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act[20] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant

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17 See generally, the Exchange's Fee Schedule (available at https://info.memxtrading.com/fee-schedule/), which provides for various enhanced rebates and reduced fees for non-Retail Order flow.

18 15 U.S.C. 78f(b)(5).

19 15 U.S.C. 78f(b)(5).

20 15 U.S.C. 78f(b)(4) and (5).

competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts Retail Orders (including Removing Retail Orders) and other orders seeking to interact with such orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."[21]

Intramarket Competition

The Exchange believes that the proposal would incentivize market participants to direct more order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. As noted above, the proposed free executions for Removing Retail Orders will be automatically and uniformly applied to all RMOs' qualifying orders and, while such proposed free executions are applicable only to qualifying Retail Orders, which may only be submitted by RMOs, the Exchange believes this application is equitable and not unfairly discriminatory as the Exchange offers other pricing incentives in the form of enhanced rebates and reduced fees to qualifying

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[21] See supra note 14.

non-Retail Order flow that may be submitted by all Members.[22] Further, the differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around Retail Order executions such that retail investors would receive free executions for Removing Retail Orders on the Exchange rather than paying a fee, as they do currently, in order to encourage entry of Removing Retail Orders to the Exchange. As such, the Exchange believes the proposal would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market.

Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, particularly as they relate to competing for Retail Order flow, as described above, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed change is a competitive proposal through which the Exchange is seeking to encourage

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22 See supra note 17.

additional order flow to the Exchange through a pricing incentive that is comparable to, and competitive with, pricing programs in place at other exchanges.[23] Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar incentives to market participants to encourage the submission of Retail Order flow.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[24] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. SEC, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'….".[25] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

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23 See supra note 11.

24 See supra note 14.

25 NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[26] and Rule 19b-4(f)(2)[27] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MEMX-2021-18 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MEMX-2021-18. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

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26 15 U.S.C. 78s(b)(3)(A)(ii).

27 17 CFR 240.19b-4(f)(2).

comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2021-18 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

J. Matthew DeLesDernier,

Assistant Secretary.

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28 17 CFR 200.30-3(a)(12).